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In the Supreme Court of the United States

OCTOBER TERM, 1977

DAVID B. SWOAP, Director of the State Department of Benefit Payments, PETITIONER

v.

MARGUARITA GARCIA and PALMIDA CASTANON

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND DISTRICT, OF THE STATE OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is filed in response to the Court's invitation of October 3, 1977.

OPINION BELOW

The opinion of the court of appeal (Pet. App. 1-16) is reported at 63 Cal. App. 3d 903, 134 Cal. Rptr. 137. The superior court did not write an opinion.

JURISDICTION

The judgment of the court of appeal was entered on November 17, 1976. A petition for rehearing was denied on December 15, 1976 (Pet. App. 17). On February 3, 1977, the Supreme Court of California denied a petition for hearing (Pet. App. 18). The petition for a writ of certiorari was filed on May 3, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether a state may compute benefits under the Aid to Families with Dependent Children program by reference to the nonwelfare income a family actually receives during a month before the benefits are paid.

STATEMENT

1. The Aid to Families with Dependent Children ("AFDC") program, established by the Social Security Act of 1935, 49 Stat. 627, as amended, 42 U.S.C. (and Supp. V) 601 *et seq.*, is designed to "help maintain and strengthen family life" by providing aid to needy children who are living with parents or relatives and who have "been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent * * *." Sections 401 and 406(a)(1), 42 U.S.C. 601 and 606(a)(1). The program is financed by matching federal and state funds and is administered by the states. Participation in the program is optional,[1] and Congress has left considerable administrative latitude to participating states. See *King* v. *Smith*, 392 U.S. 309, 316-319; S. Rep. No. 628, 74th Cong., 1st Sess. 4, 19 (1935). States wishing to participate must submit benefit plans for the approval of the Secretary of Health, Education, and Welfare ("HEW"), and the Secretary must approve the plans if they comply with the requirements of Section 402(a) of the Act, 42 U.S.C. (Supp. V) 602(a).

California uses a "prior month budgeting" (PMB) system to compute AFDC monthly grants. See California Eligibility and Assistance Standards Manual ("EASM") § 44-315.6 (Pet. 3). This means that the amount of AFDC benefits received in any given month depends directly on the recipient's income in a previous month. California determines AFDC grants for the first and second calendar months of eligibility on the basis of known or estimated income in those two months. Thereafter, the state computes AFDC payments according to the PMB method. Before the 10th of each month, each AFDC family must submit a report indicating the source and amount of the family's nonwelfare income for the previous month. On the basis of this information, California calculates the amount of the family's AFDC benefits for the following month. Thus, non-

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[1] All 50 states and the District of Columbia now are participating in the AFDC program. See Congressional Research Service, United States Library of Congress, *Administration of the AFDC Program—A Report to the House Committee on Government Operations* (1977).

welfare income received in April is reported in May and determines the AFDC payment for June. In this example, April is the "budget" month, May the "reporting" month, and June the "payment" month.

The amount of nonwelfare income in the payment month may differ from that in the budget month. Changes in nonwelfare income will not affect AFDC payments until two months after the changes occur. AFDC grants in the two months immediately following a decrease in nonwelfare income therefore may be inadequate to fulfill recipients' needs. California has provided for supplemental payments when "unusual and unforseen substantial changes in a recipient's income" make such payments "necessary to protect the welfare of the child(ren)." EASM § 44-315.8.[2]

2. Respondents are California AFDC recipients. In the summer of 1974 respondent Garcia was the mother of four children. From 1970 through May 1974 the AFDC program was the sole source of support for her and her family. By the latter date

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[2] Supplemental payments in any month are limited so that the total AFDC grant, together with available nonwelfare income, does not exceed the maximum aid allowable in the absence of nonwelfare income.

In addition, the currently effective California regulation imposes a ceiling on the total amount of supplemental payments an AFDC family may receive. When supplemental payments are made in more than one month, the total amount of such payments may not exceed the recipient's total nonwelfare income during the first two months for which AFDC benefits were provided. A proposed revision of California's regulation would eliminate this restriction on the total amount of supplemental payments to one AFDC family. See pages 22-25, *infra*.

she was receiving monthly benefits of $355. In June 1974 and in July 1974, she received child support payments of $200 from her ex-husband. She reported this income to her county caseworker, and her AFDC benefits for August and September 1974 were reduced to $155 per month. Mrs. Garcia received no child support from her ex-husband in August and September 1974. See Pet. App. 5.

In mid-1974 Mrs. Castanon had one child and was receiving $336 each month in AFDC benefits. Her unemployed husband found work in July 1974 and earned $250 in nonexempt income. Mrs. Castanon reported this income to her caseworker, and her AFDC payment for September 1974 was reduced to $86. Mr. Castanon left his family in August 1974 and did not return. He provided no funds for his family in September 1974. See Pet. App. 5-6. The record does not indicate that either Mrs. Garcia or Mrs. Castanon sought supplemental payments for the months in which their AFDC benefits were reduced.

On September 16, 1974, respondents filed this suit in Los Angeles County Superior Court, on behalf of themselves and a class consisting of all other California AFDC recipients. Respondents contended that the PMB system violated both HEW regulations and state law and was incompatible with the purpose of the AFDC program, *i.e.*, providing for the current needs of dependent children. They sought declaratory and injunctive relief against California's continued use of the PMB method in computing AFDC benefits.

While respondents' action was pending in superior court, California officials submitted to the Secretary a written inquiry concerning PMB's status under applicable federal regulations. On December 12, 1974, the Secretary's delegate replied that he "fully endorse[d] this method of accounting for recipient income and consider[ed] it a proper and efficient method of administration" (Pet. App. 19). He attached to his reply an opinion issued by the office of HEW's General Counsel. The opinion reported that (Pet. App. 21):

> * * * States have been permitted considerable administrative latitude in determining the period for which income is reflected in the assistance grant, with the result that income is not always (indeed, is not usually) deducted from the assistance check for the month the income is received and available to the individual. Instead, many States find it administratively simpler and more accurate to deduct the income received in one month from the assistance check for the next month or even for the month after that. This is permitted under Federal policy as a reasonable method of administration, as long as it is applied uniformly and consistently, and it presents no conflict with our interpretation of the regulation on available income.

Petitioner informed the superior court of the Secretary's approval of the PMB system and, on March 28, 1975, the court denied respondents' request for a preliminary injunction and entered summary judgment for petitioner.

The court of appeal reversed (Pet. App. 1-16) and held the PMB approach invalid. The court ruled that PMB violates the federal regulation requiring state AFDC plans to determine need and amounts of assistance payments by considering "net income available for current use and currently available resources * * *." See 45 C.F.R. 233.20(a)(3)(ii)(D). By computing AFDC benefits on the basis of income received in an earlier month, the court decided, California disregarded the federal command to consider "income available for current use." In the court's view, when an AFDC grant is reduced because of income received in the budget month but not in the payment month, PMB operates "as a streamlined form of recoupment" of earlier AFDC overpayments (Pet. App. 11). Seen in this light, the court concluded, PMB violates federal recoupment regulations, 45 C.F.R. 233.20(a)(12)(i), and the specific recoupment limitations contained in Cal. Welfare and Inst. Code § 11004 (West 1972). These provisions, according to the court, "proscribe the reduction of a subsequent assistance payment in the amount of a prior overpayment unless the recipient has sufficient income or resources available to meet the current needs of the needy child" (Pet. App. 11).

The court of appeal denied a petition for rehearing (Pet. App. 17), and petitioners sought review in the Supreme Court of California. That court denied the petition for hearing (Pet. App. 18).

DISCUSSION

1. This is an important case that may affect the future of PMB not only in California, but also in the 18 other states that employ PMB systems either exclusively or in combination with other methods for determining AFDC payments. See Congressional Research Service, United States Library of Congress, *Administration of the AFDC Program—A Report to the House Committee on Government Operations* 118-119 (1977) (hereinafter cited as "CRS Report"). The state court's opinion is ambiguous, however, in its explanation of the extent to which it relied on federal statutes, federal regulations, and state law in arriving at the conclusion that PMB is unlawful.

We believe that the court of appeal erred in holding that the PMB system violates federal AFDC regulations. The Secretary has determined that PMB is compatible with the federal regulations cited by the state court (Pet. App. 19-22), and the Secretary's interpretation of his own regulations is entitled to deference. See, *e.g.*, *Northern Indiana Public Service Co.* v. *Walton League*, 423 U.S. 12, 14-15; *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 413-414; *Ehlert* v. *United States*, 402 U.S. 99, 104-105. Neither the regulation requiring state plans to consider "currently available resources" in determining AFDC benefits (45 C.F.R. 233.20(a)(3)(ii)(D)) nor the regulation governing recoupment of prior AFDC overpayments (45 C.F.R. 233.20(a)(12)(i)) was intended to limit the states' flexibility in devising accounting procedures most likely to produce accurate

AFDC payments. Yet the state court did not even mention the Secretary's explicit approval of PMB.

The Secretary has concluded that PMB is an efficient and desirable method of AFDC administration (Pet. App. 19).[3] California operates the largest AFDC program in the country. The PMB system has enabled the state to hold its errors in the distribution of benefits to a rate significantly below the national average. Moreover, experience has indicated that other budgeting procedures in use elsewhere respond no more rapidly to changes in nonwelfare income received by AFDC beneficiaries. We discuss these considerations, and the other reasons for our conclusion that PMB is an appropriate method, in more detail at pages 12-22, *infra*.

There is no conflict in judicial decisions concerning PMB, and ordinarily the Secretary could rectify any problem caused by an erroneous state court decision by the simple expedient of amending the federal regulations. New regulations could eliminate any controversy over the validity of the state's action by expressly approving the state's conduct or committing the subject matter involved to state discretion. Here, however, the state court's opinion leaves unclear whether amended regulations would be sufficient to answer the court's objections to PMB. Al-

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[3] Indeed, in 1975, the Secretary published a Notice of Proposed Rulemaking for a regulation that would have made a modified PMB system mandatory for all states participating in the AFDC program. 40 Fed. Reg. 36141. The regulation was never promulgated in final form.

though the court did not explicitly state that the California system violates a particular federal statutory provision, its broad language may easily be read to imply that regulatory changes alone would not be adequate to cure PMB's alleged infirmities. The court declared that PMB "is fundamentally at odds with AFDC policies and provisions" (Pet. App. 13) and produces results prohibited by "federal AFDC law and policy" (*id.* at 12).

The case is further complicated by the possible presence of an adequate state ground for the state court's decision. Respondents contended, *inter alia*, that PMB "contravenes California statutes setting minimum aid standards (Welfare and Inst. Code, § 11450) and limiting reductions of current grants to effect recoupment for prior overpayments (Welfare and Inst. Code, § 11004)" (Pet. App. 6). The court of appeal did not discuss the former provision, but it apparently concluded that, under certain circumstances, PMB violates § 11004(e). The court focused on the consequences of the PMB system for AFDC beneficiaries whose nonwelfare income first increases significantly and then returns to its previous level. In the court's view, PMB first generates AFDC "overpayments" to such recipients and then automatically recovers such "overpayments" without regard to the recipients' financial status at the time of the recovery.[4] This aspect of PMB, the

[4] In payment months immediately following the increase in nonwelfare income, AFDC benefits will not diminish because they will be calculated on the basis of nonwelfare income in

court decided, is inconsistent with the recoupment limitations in Cal. Welfare and Inst. Code § 11004(e) (West 1972) and also with the similar limitations in 45 C.F.R. 233.20(a)(12)(i)(A)(*1*).

The state court's characterization of PMB as a method for recouping AFDC "overpayments" is inaccurate (see pages 19-22, *infra*). But it is impossible to determine from the state court's opinion whether that court would have reached its result on the basis of state law alone. The court's conclusion that PMB determines AFDC payments by considering income other than "net income available for current use" and thereby violates 45 C.F.R. 233.20(a)(3)(ii)(D) may have been dispositive because, if the court had been persuaded that PMB is a permissible procedure for computing AFDC benefits, it might not have ruled that PMB is an illegal tool for the recovery of AFDC "overpayments." But the court did not exclude the possibility that state law alone would have supported its decision. Because the validity of the PMB system is an important question, ultimately in need of definitive resolution, this Court should grant the petition, vacate the judgment, and remand for further proceedings to identify the basis of the

months before the increase. Likewise, in payment months immediately following the return of nonwelfare income to its earlier level, AFDC benefits will not rise, because they will be calculated by reference to months during which increased amounts of nonwelfare income were still being received. Thus, in some months, the total of AFDC payments and nonwelfare income will be higher than the maximum aid allowable and in other months it will be lower.

state court's decision. See *Minnesota* v. *National Tea Co.*, 309 U.S. 551; *Department of Mental Hygiene* v. *Kirchner*, 380 U.S. 194; *California* v. *Krivda*, 409 U.S. 33; *Paschall* v. *Christie-Stewart, Inc.*, 414 U.S. 100; *Philadelphia Newspapers, Inc.* v. *Jerome*, No. 77-308, decided January 9, 1978.

2. Because the issue presented by this case is important and likely to recur, we briefly discuss the governing legal principles even though we do not suggest that the Court undertake plenary review at the present time.

a. Section 402(a)(7) of the Social Security Act of 1935, as amended, 42 U.S.C. (Supp. V) 602(a)(7), provides that "[a] State plan for aid and services to needy families with children must * * * provide that the State agency shall, in determining need, take into consideration any other income and resources" of persons claiming AFDC benefits. The statute, however, says nothing about the frequency with which such other income should be reported or the proper correlation between an income measurement period and the date of the corresponding assistance payment.[5] Similarly, federal regulations contain no periodic income reporting rules and no requirement that the amount of AFDC benefit checks be calculated by reference to other income received during a particular interval. The regulations simply require state AFDC plans to "[p]rovide that, in determining need and the amount of the assistance payment, * * * net income available for current use and currently available resources shall be considered" (45 C.F.R. 233.20(a)(3)(ii)(D)). The Secretary has determined that the California PMB system is a permissible method for assessing "income available for current use and currently available resources" (Pet. App. 19-22).[6]

There is substantial variation among the income reporting and accounting practices adopted by state AFDC plans.[7] The divergent approaches manifest the considerable independence retained by the states in their administration of the AFDC program. Twelve states use PMB exclusively in computing AFDC benefits, and six others use a combination of PMB and

[5] Contrast, for example, the Supplemental Security Income program covered by Title XVI of the Social Security Act, as added, 86 Stat. 1465, and amended, 42 U.S.C. (Supp. V) 1381 *et seq.* Under Section 1602(c)(1), 42 U.S.C. (Supp. V) 1382(c)(1), "[a]n individual's eligibility for benefits * * * and the amount of such benefits shall be determined for each quarter of a calendar year * * *."

[6] The Secretary's position is consistent with the definition of "case error" employed in evaluating the efficiency of state AFDC programs. Under the Secretary's regulations, 45 C.F.R. 205.40(a)(2), (b)(2), a state will not be charged with a case error if it correctly adjusts an AFDC family's welfare payment not later than the second month after a month in which the family's income or other relevant circumstances change. Under this standard, California's PMB scheme, when functioning properly, does not give rise to case errors, because AFDC benefits paid in one month reflect income received two months earlier.

[7] For a complete survey of the state methods, see CRS Report 85-125 Part 3, "Income of AFDC Families: How It Is Reported and Measured."

some other accounting method.[8] CRS Report 118-119. California is one of only three states that require a monthly income report from each AFDC family, whether or not its circumstances have changed. CRS Report 87, 102.

The primary alternative to PMB is concurrent month budgeting (CMB). In a CMB system the AFDC payment for a particular month is based on an estimate of the amount of nonwelfare income that a family will receive during that month. This estimate is based on the family's past experience and on changes expected in the near future. The amount of the assistance payment equals the difference between the amount the family "needs" for the month (as determined by the relevant state need standard) and the estimated amount of nonwelfare income that the family will receive during the month. AFDC plans in 20 states use CMB either exclusively or in combination with other accounting methods (*ibid.*).[9]

Ideally, a CMB system would allow adjustments in AFDC assistance payments to be made immediately after a change in income has occurred or as soon as

[8] Cf. Section 5(f) of the Food Stamp Act of 1977, Pub. L. 95-113, 91 Stat. 963 (to be codified at 7 U.S.C. 2014(f)). This provision makes eligibility for food stamps dependent on anticipated income during the period for which eligibility is being determined and on income actually received during the 30-day period preceding the application for benefits.

[9] States that do not use either PMB or CMB base AFDC payments either on income expected in some future month other than the payment month or on a monthly average of income received during some two-month, three-month or six-month period in the past. CRS Report 107, 118-119.

a change is anticipated. Errors caused by erroneous estimates of future income would be corrected by a system instantaneously responsive to changed circumstances. Unfortunately, most states are not able to respond immediately to an AFDC family's change in income. Indeed, because most states do not require monthly reports by beneficiaries (CRS Report 102-105), many income changes are not discovered for several months. Even when unexpected changes in income are promptly reported, CMB systems normally cannot adjust assistance payments until the following month.[10] Processing delays may further postpone adjustments. Experience with different accounting systems suggests that PMB entails no significant loss in responsiveness and a considerable gain in certainty and simplicity.

A comparison of the AFDC performance in California and New York is instructive. Despite having the nation's largest AFDC caseload (469,000 families in fiscal year 1976, 13.3 percent of the national total), California achieved a 1975 combined case error rate (see note 6, *supra*) 29 percent below the national average. CRS Report 109, 129, 134. By contrast, New York,[11] with the second largest AFDC

[10] In a state that provides for payments twice monthly, an income change theoretically could be reflected in the next installment. As a practical matter, however, the time required for processing would make such a result unlikely.

[11] New York computes the amount of AFDC assistance on the basis of income expected in the month of initial or redetermined eligibility, plus that received in the four preceding weeks. Monthly income reports are not mandatory, and

caseload (372,000 families in fiscal year 1976, 10.5 percent of the national total), had a combined error rate 62 percent above the national average.[12] CRS Report 109, 129, 140. In addition, administrative costs of the AFDC program in California compare favorably with similar costs in New York. Summarizing recent case studies of the two states, the CRS Report noted (*id.* at 127):

> New York and California together make up over 40 percent of AFDC administrative costs in

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periodic report forms are not mailed to recipients. Recipients are expected to report changes in income or other family circumstances as they occur.

[12] The following table illustrates the California and New York records as compared to AFDC performance in the nation as a whole (CRS Report 141; footnote omitted):

AFDC PAYMENT ERROR RATES, UNITED STATES, CALIFORNIA AND NEW YORK, AMOUNT OF PAYMENTS ERRORS AS A PERCENT OF TOTAL PAYMENTS

	To Ineligibles (percent)	Overpayments (percent)	Underpayments (percent)
United States:			
January to June 1976	4.8	4.1	0.9
July to December 1975	5.5	4.7	1.0
April to September 1973	8.9	7.1	1.4
California:			
January to June 1976	2.3	2.7	.5
July to December 1975	2.5	3.6	.7
April to September 1973	6.9	5.4	1.4
New York:			
January to June 1976	7.1	5.9	2.2
July to December 1975	9.2	6.3	1.7
April to September 1973	16.7	9.3	1.7

> the country. In 1976, New York spent $230 million and California spent $206 million. Yet California has 100,000 more AFDC cases to administer than New York and reports 2½ times more applications processed. New York spent an average of $623 per AFDC case and California spent an average of $439 per case.[13] Yet in the January-June 1976 quality control review period, New York had an ineligibility rate of 9.9 percent, while California's was only 2.2 percent. In fiscal year 1976 New York paid out approximately $200 million erroneously per year while California paid out less than $80 million to ineligible and overpaid recipients.

Thus, California, using the PMB system, has enjoyed notable success in distributing AFDC benefits in the proper amounts to the proper recipients, and it has achieved that success at costs significantly less than those incurred by the next largest AFDC state program.

b. Disregarding both the Secretary's approval and the administrative advantages of California's accounting system, the state court found that PMB "is fundamentally at odds with AFDC policies and provisions" (Pet. App. 13). In reaching this result, the court relied on several decisions of this Court and other federal courts concerning the AFDC program. These earlier cases are not controlling here.

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[13] Even California's costs are significantly higher than the national average. In fiscal year 1976 the national administrative costs for the AFDC program were $1.07 billion. This sum covered 3,527,000 recipient families. CRS Report 129. The national average cost per AFDC case therefore was approximately $303.

King v. *Smith*, *supra*, *Lewis* v. *Martin*, 397 U.S. 552, and *Van Lare* v. *Hurley*, 421 U.S. 338, involved state AFDC regulations that treated non-parents as parents or conclusively presumed that certain non-parents would contribute to the needs of a welfare household, without any evidence that they had actually done so. Such regulations served to limit eligibility for or the amount of AFDC benefits on the basis of assumptions not necessarily borne out in fact.[14] This Court held that the state regulations

[14] The Alabama regulation reviewed in *King* provided that an "able-bodied man" who "cohabits" with a woman "is considered a substitute father" of all her children, whether or not he is actually their father, whether or not he is legally obligated to contribute to their support, and whether or not he contributes to their support (392 U.S. at 313-314). This "substitute father" provision made it impossible for certain children to show deprivation of parental support or care that had been caused by "death, continued absence from the home, or physical or mental incapacity of a parent * * *." See Section 406(a) of the Act, 42 U.S.C. 606(a).

The California regulation at issue in *Lewis* provided that AFDC payments to a needy child living with his mother and a man "assuming the role of spouse to the mother although not legally married to her" should be computed after consideration of the man's income (397 U.S. at 553-554). No showing that that income had been or would be used for the child's support was required. The California regulation thus reduced AFDC payments by taking into account resources not necessarily available for the needy child.

Similarly, the New York regulation reviewed in *Van Lare* reduced the shelter allowance for an AFDC family by a pro rata share whenever a non-paying lodger, by definition ineligible for welfare, lived with the family (421 U.S. at 341-342, 346-347). That is, if a family of four, entitled to an AFDC shelter allowance of $150, took in a non-paying lodger, its allowance would be reduced to $120. Such reductions were based on the assumption that the lodger would help defray the total cost of shelter for himself and the AFDC beneficiaries. This assumption was made without inquiry into the lodger's actual contribution, if any.

were inconsistent with the congressional goal of providing economic security for needy children deprived of parental support. *King* v. *Smith*, *supra*, 392 U.S. at 329-333; *Lewis* v. *Martin*, *supra*, 397 U.S. at 557-560; *Van Lare* v. *Hurley*, *supra*, 421 U.S. at 345-347. The Court concluded that the federal AFDC statute and regulations preclude the states "from assuming that nonlegally responsible persons will apply their resources to aid the welfare child" (*id.* at 347).

The PMB system does not involve any assumptions or presumptions. Benefits are based solely on income actually received by the welfare family. Indeed, the fundamental purpose of PMB is to avoid unwarranted assumptions about the amount of nonwelfare income that will be received by an AFDC family.

National Welfare Rights Organization v. *Weinberger*, 377 F. Supp. 861 (D. D.C.), and *Cooper* v. *Laupheimer*, 316 F. Supp. 264 (E.D. Pa.), cited by the California Court of Appeal, are likewise inapposite.[15] Those cases involved challenges to federal

[15] The third district court decision cited by the court of appeal, *Hagans* v. *Wyman*, 399 F. Supp. 421 (E.D. N.Y.), has been reversed, *Hagans* v. *Berger*, 536 F. 2d 525 (C.A. 2). The case involved a challenge to a New York AFDC regulation designed to prevent eviction of welfare tenants because of delinquent rental payments. The regulation permitted AFDC

and state regulations governing the recoupment of AFDC overpayments. The federal regulation at issue in *NWRO* and the Pennsylvania regulation at issue in *Cooper* both permitted recovery of previously paid excess AFDC benefits, without regard to the recipients' actual financial situation at the time of the proposed recovery. The regulations authorized recoupment without any showing that the beneficiaries still had the excess payments in their possession or that their actual financial circumstances would allow re-

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recipients who were facing eviction for nonpayment of rent to request an advance on their monthly shelter allowance. The regulation required the recipients to agree to reduction of their shelter allowance in equal amounts over the next six months to repay the amount of the advance allowance. The court of appeals correctly held that the advance allowance procedure is consistent with Title IV of the Social Security Act and does not violate the federal regulation precluding recoupment of AFDC overpayments unless the recipient has currently available nonwelfare income in the amount of the proposed recovery. See note 16, *infra*. In answer to an argument that the New York regulation conflicted with the federal recoupment regulation, the court stated (536 F. 2d at 532; footnote omitted):

> Since the State Regulation here authorizes the advance allowance, it cannot be properly characterized as an excess over the amount that *"should"* have been paid. "Overpayment" would seemingly connote a payment which was unintentionally made either through a mistake by the agency or through the mistake or fraud of the recipient. While the payments made here are in excess of the regular monthly grant, they were of course intentionally advanced at the written request of the recipient.

Similar reasoning applies here. Because respondents' AFDC benefits were precisely what they should have been under the PMB system, no overpayment, and hence no recoupment, was involved.

covery to proceed without causing hardship. The courts held the controverted regulations invalid because they presumed that earlier overpayments would still be available, when in fact the resources might have been exhausted.[16]

Again, the PMB system does not rest on such a presumption. Respondents were not overpaid under the California system, and no attempt was made to recover any overpayment. PMB is simply an accounting method designed to implement the regulatory requirement that AFDC payments be based on "net income available for current use and currently available resources." As the Secretary's delegate has explained (Pet. App. 21), a literal reading of the "currently available" language

> would mean that unless the individual has his total income in hand when the assistance check is issued (or maybe even received), that income may not be deducted in determining the amount of his grant. This would mean that the only time income could be counted would be when it was received at the same time the assistance check was issued (or received). Otherwise the agency would be counting income that the indi-

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[16] After the district court's decision in *NWRO*, the federal regulation governing recoupment of AFDC overpayments was changed. 45 C.F.R. 233.20(a)(12)(i)(A)(*1*) now provides that, except where a recipient has willfully withheld relevant information, "[t]he State may not recoup any overpayment previously made to a recipient * * * [u]nless the recipient has income or resources exclusive of the current assistance payment currently available in the amount by which the agency proposes to reduce payments."

vidual spent (or at least [had] begun to spend) and that was no longer available to him. This ridiculous result was clearly not intended by the regulation.

On the contrary, the regulation was intended to preclude the consideration of income that was, in fact, never available to the individual, or that had not been available to him for a substantial period of time.

AFDC benefits, computed under the PMB method, are based solely on income actually received during the "budget" month, which is two months before the "payment" month. Under the PMB system recipients should know that increases in nonwelfare income will be followed by reductions in AFDC benefits, and they can plan accordingly. By contrast, the regulation reviewed in *NWRO* provided for recoupment of overpayments made as much as a year earlier, and the Pennsylvania regulation reviewed in *Cooper* apparently mandated recovery of duplicate payments, no matter how long ago they had been made. The recoupment might come as a surprise, creating a substantial risk of hardship. That risk, against which the district courts sought to protect in *NWRO* and *Cooper*, is not present under the California PMB system to an extent even remotely comparable.

3. California's supplemental payment system serves to mitigate whatever problems may arise when nonwelfare income decreases. For the first two months after a decrease, AFDC benefits calculated under PMB will continue to reflect the previous, higher, level of nonwelfare income. Accordingly,

existing California regulations provide that "[i]f unusual and unforseen substantial changes in a recipient's income occur, a supplemental payment may be made when necessary to protect the welfare of the child(ren)" (Pet. 3; EASM § 44-315.8). In the aftermath of the state court's decision in this case, California has proposed new supplemental payment regulations that would make such payments mandatory whenever (i) "a family budget unit receives or will receive less net nonexempt income in the payment period than was computed from the corresponding budget period" and (ii) "[a]n emergency situation exists/will occur if the supplemental payment is not issued in that payment period." [17] Under the proposed regulations, supplemental payments must be issued within three days after a qualified recipient's request. In addition, the proposal would eliminate the current ceiling on the total amount of supplemental payments a single AFDC family could receive in more than one month (see page 4, *supra*). The potential practical disadvantages of the PMB system are substantially lessened by California's supplemental payment rules, and the proposed revision of those rules would diminish still further

[17] The quoted passages are taken from proposed EASM §§ 44-315.8 and 44-315.822. The California proposal is contained in a draft prepared by the current Director of the State Department of Benefit Payments and in a revised version of that draft reported in a February 17, 1978, letter from the Director to respondents' counsel. Copies of the original draft and the Director's letter have been lodged with the Clerk of this Court.

the possibility that PMB will cause temporary hardship for AFDC families.

The state court's decision is ambiguous concerning the efficacy of supplemental payments. After describing the shortcomings it saw in the PMB system, the court commented that California's supplemental payment regulation "is designed to alleviate the problem and is not mandatory" (Pet. App. 12). The court continued, "We emphasize this point because it is believed that Prior Month Budgeting is a helpful and, if properly applied, reasonable method for computing welfare grants. The *regulation* should be amended so as to provide payments to protect the children. If this were accomplished, the PMB system would then comply with federal regulations" (*ibid.*). Another portion of the opinion, however, seems to take exactly the opposite position, stating: "The vagaries in the existing PMB system, apparent in such cases as those of [respondents], cannot be alleviated simply by the application of an emergency payment or supplement payment provision" (*id.* at 14).

The California Attorney General's office has informed us that, in reliance on the first excerpt from the state court's decision, California has retained its PMB system and has attempted to respond to the court's concerns through liberalized use of supplemental payments, soon to be reflected formally in the revised regulations described above. Whether the state's action will satisfy the California courts is not clear. We are advised that the sufficiency of the revised supplemental payment regulations will be considered in further state court proceedings scheduled to occur in the near future. The uncertain outcome of these proceedings, combined with the possibility that the state court's decision rested on an adequate state ground (see pages 10-11, *supra*), makes it inappropriate for this Court to undertake plenary review. The Secretary regards PMB as an efficient tool of AFDC administration that is fully compatible with federal law and regulations. Preservation of the PMB system in California is important to the continued successful operation of the nation's largest AFDC program. But, for the reasons we have discussed, a remand for clarification of the basis of the state court's decision is the appropriate course here.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment vacated, and the case remanded to the court of appeal for further proceedings to determine whether the state court's decision rested on an adequate state ground.

Respectfully submitted.

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